Postal Regulatory Commission
Submitted 7/20/2012 4:22:57 PM
Filing ID: 83760
Accepted 7/20/2012

BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, DC 20268-0001

Mail Processing Network Rationalization Service Changes, 2012	))	Docket No. N2012-1

REPLY BRIEF

OF

VALPAK DIRECT MARKETING SYSTEMS, INC. AND
VALPAK DEALERS' ASSOCIATION, INC.
(July 20, 2012)

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I. The Initial Briefs Evidence Enormous Divergence of Opinion with Respect to the Commission's Role in an Advisory Opinion Docket.

The Initial Briefs filed herein, predictably, show that the Postal Service believes the Commission has a relatively minor role in postal policy formation in the issuance of an Advisory Opinion under 39 U.S.C. section 3661(b)-(c), while intervenors opposing the Postal Service proposal and the Public Representative believe that the Commission has a much more substantial role. This reply brief will first review the claims made by the Postal Service, various intervenors, and the Public Representative. Then, in view of those observations, it will take a fresh look at the relevant statutes governing Advisory Opinions.

A. Postal Service View of the Commission's Role in the Advisory Opinion Process.

The Postal Service addresses the Commission's role in a section unusually entitled "The Postal Service Intends to Carefully Review the Commission's Opinion" (USPS Initial Brief, p. 8).

The Postal Service acknowledges that, in this docket, "the changes will be the most significant changes in the nature of service since the administrative review process in section 3611 was established as part of the 1970 Postal Reorganization Act." It asserts that the Postal Accountability and Enhancement Act of 2006 ("PAEA"):

> preserves the primacy of postal management in determining the terms and conditions of postal services. However, section 3661(b) continues to reserve a very important role for the Postal Regulatory Commission by requiring that it have an opportunity to offer non-binding advice … before implementation commences. [*Id.*, p. 9.]

The Postal Service believes that its Governors and management have broad discretion to make changes in the nature of service, and that the Commission's role is limited to "developing an

evidentiary record relevant to the service change proposal … and opining whether the Board's and postal management's planned service change is permitted by the policies of title 39…" without "searching for or soliciting alternative service changes" and spending "months reducing the cost or savings implications to the PRC's best estimate." *Id.*, pp. 10-11. The Postal Service appears to view the Commission's role as either approving or disapproving the proposal, but not offering constructive suggestions, or passing along the constructive suggestions of parties developed on the record.

B. Intervenors' View of the Commission's Role in the Advisory Opinion Process.

Association of Postal Workers Union ("APWU") anticipates a robust role for the Commission, as it concludes with a recommendation "that the Postal Service be advised to make [specified] revisions as its moves forward." APWU Initial Brief, p. 38. The National Newspaper Association ("NNA") waxes poetic when it states that the Commission serves as "the body endowed in the law with considering the greater good." NNA Initial brief, p. 18.

C. The Public Representative Offers a Novel View.

The Public Representative ("PR") disagrees with the Postal Service, and believes:

> The proceeding is **not meant to be a simple approval or disapproval**, but rather **expert advice** crafted within the bounds of the policies established under title 39, following the opportunity for due process for those mailers affected by the change. [PR Initial Brief, p. 7 (emphasis added).]

The PR focuses on the last words of the statute requiring each Commissioner agreeing with the opinion to certify that "the opinion conforms to the policies established under this title." The PR believes that there is what it calls a "subtle distinction" to be found in the statute, from

which it concludes, "the Commission's advisory opinion must conform with the policies of the title, but there is not a direct link in the statutory language between the proposed change [termed a "change" or a "proposal"] and the adherence to the policies of title 39 [which refers only to the "opinion"]." *See* PR Initial Brief, p. 6. For this reason, "[t]he proceeding is not meant to be a simple approval or disapproval [thumbs-up or thumbs-down], but rather expert advice crafted within the bounds of the policies established by title 39…." *Id.*, p. 7. Of course, one could come to this same conclusion without adopting the PR's analysis, as discussed in the next subsection.

D. A Fresh Look at the Advisory Opinion Process Reveals Interesting Facts.

In attempting to discern the statutory scheme, NNA makes an interesting observation: "A combination of inartful language and the usual dualistic desire of Congress to have the benefit of a postal regulatory body without hampering USPS's operations with one are likely at the root of the ambiguity…." NNA Initial Brief, p. 17. Although it is certainly possible for Congress to use inartful language, and to have attempted to reconcile inconsistent, and even conflicting, goals, it is necessary to make a sincere effort to discern from the statutory scheme the proper role of the Commission — an issue which transcends the question of whether the Postal Service's proposed changes in any particular docket should be made.

There are two basic statutory provisions, the first being 39 U.S.C. section 3661:

> (b) When the Postal Service determines that there should be a change in the nature of postal services which will generally affect service on a nationwide or substantially nationwide basis, it shall **submit a proposal**, **within a reasonable time prior** to the effective date of such proposal, to the Postal Regulatory Commission requesting an **advisory opinion** on the change.

> (c) The Commission shall not issue its opinion on any proposal until an opportunity for **hearing on the record** under **sections 556 and 557** of title 5 has been accorded to the Postal Service, users of the mail, and an officer of the Commission who shall be required to represent the interests of the general public. The opinion shall be in **writing** and shall include a **certification** by each Commissioner agreeing with the opinion that in his judgment the **opinion conforms to the policies** established under this title. [Emphasis added.]

The Administrative Procedure Act provisions quoted in this statute are likewise important, and 5 U.S.C. sections 556 and 557 are set out in full in Appendix I. From these three statutes, a number of observations can be drawn as to how the process is to work. One can then draw conclusions about the role of the Commission and whether the Advisory Opinion it is required to issue should be the Postal Service's simple "up or down" recommendation, or whether it should be a more robust statement of expert opinion.

Initial Determination. The Postal Service is given the sole authority to initiate a change in the "nature of postal services." It also makes the threshold determination if the change will "affect service on a nationwide … basis."[1] These provisions are in recognition of the responsibility of the Postal Service Board of Governors to manage the Postal Service. 39 U.S.C. sections 202(a)(1), 403.

From this, and other provisions discussed below, one can conclude that just as the Postal Service should not attempt to usurp the role of the Commission,[2] the Commission should

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[1] Valpak has urged the Postal Service to withdraw an N-docket case, when the Postal Service's proposal no longer had nationwide implications. *See generally* Docket No. N2009-1, Valpak Initial Brief (Dec. 2, 2009).

[2] As an example, the Postal Service sought to usurp the Commission's role in its appeal from the Commission's finding of noncompliance in Docket No. ACR2010. *See* USPS

never attempt to usurp the Governors' statutory duty to manage the company. For reasons unclear, one of the greatest temptations faced by any governmental body seems to be the temptation to usurp the role of another governmental body, which almost always leads to unnecessary conflict, as well as ignoring assigned statutory responsibilities. Sadly, Congress is not immune from this temptation to usurp, as Congress first vests the duty and responsibility to manage the Postal Service to the Governors, and then micro-manages the Postal Service by constraining its best judgment as to where necessary costs should be cut (such as Saturday delivery), often urged along by various components of the mailing community. These politically-imposed constraints often run contrary to good business principles. If mailers or unions oppose nearly **every** cut that the Postal Service wants to make, it is difficult to take them seriously when they raise specific objections to **each** successive set of cuts — such as those in this docket. However, even Valpak, which has long been a strong supporter of the Postal Service's prerogatives to manage its expenses, believes that the Commission must decide N-dockets based on the merits of the case, offering its best expert judgment to the Postal Service. The fact that the Postal Service has the sole authority to initiate an N-docket, and later the responsibility to implement changes in the nature of service at the end of the process, does not mean that the Commission should simply defer to the Postal Service's view of the policies of the Title — which policies are fundamentally entrusted to the Commission's care.

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v. PRC, No. 11-1117 (D.C. Cir.), L.L. Bean and Valpak Brief (Dec. 7, 2011), pp. 27-36.

Proposal. The Postal Service must submit a proposal to the Commission requesting an Advisory Opinion on the proposed change. From this, we can deduce that the Commission would use its expertise to evaluate that proposal (with the assistance of intervenors) before rendering an opinion (*see* 39 U.S.C. section 3661(c)). The required substance of the proposal is not set out in statute, but since the proponent of a change bears the burden of proof (under 5 U.S.C. section 556(d)), it would be expected that the proposal would provide all information necessary to be reviewed, and be as complete as possible when filed, demonstrating that the proposal complies with the policies of Title 39.[3]

There is no reasons to believe a proposal cannot be changed somewhat during the course of the docket, requiring a resetting of the clock (as has been argued[4]), particularly if the proposal is being revised based on information learned in the docket — as that would appear to demonstrate the statutory plan working at its best.

Timing of Proposal. Third, a requirement is imposed on the Postal Service that the submission be made "within a reasonable time prior to the effective date." From this one can deduce that the filing must be sufficiently early that Commission would have adequate time to conduct the proceedings required under 5 U.S.C. sections 556 and 557.[5] A filing should be

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[3] *See* Docket No. RM2012-4, Valpak Initial Comments (June 18, 2012), pp. 15-16.

[4] *See, e.g.,* Docket No. C2012-2, APWU Motion for an Emergency Order, pp. 7-11.

[5] At present, the Commission's rules require notice at least 90 days before implementation, and in most cases that time period would be wholly inadequate, needing to be lengthened. *See* Docket No. RM2012-4, PR Reply Comments, pp. 7-8. However, that is a flaw in the Commission's rules, and not an insight into Congress' scheme, as the Postal

made as soon as possible by the Postal Service, and should never be delayed to shorten the time for the Commission to give full consideration.[6] On the other hand, the Commission also has a duty to proceed expeditiously — including avoiding the temptation to schedule field hearings to gather non-record evidence.[7]

Submission only Required. From the fact that there is only a requirement that a request be submitted, and no requirement that the Postal Service wait for issuance of an Advisory Opinion, one can deduce that if the Commission does not act reasonably, incurring undue delay, the Postal Service could (probably) implement the change prior to receiving such a delayed Advisory Opinion.[8]

Fact Finding, including Discovery, Cross-examination. Since the Advisory Opinion is issued after a hearing on the record, APA requires that the Commission will take "evidence" based on the testimony of persons to whom oaths were administered, with various forms of discovery (*e.g.,* depositions), a hearing (including cross-examination), and a decision based on that record. 5 U.S.C. section 556(d). Parties are given the right to submit testimony of their own. *Id*. The evidence and the transcript of the hearing become part of the record, and the

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Service would have it. Postal Service Initial Brief, p. 12.

[6] *See* Docket No. RM2012-4, Valpak Comments, pp. 8-9.

[7] *See*, *e.g.*, Docket No. N2010-1 (Five Day), Valpak Initial Brief (Oct. 15, 2010, pp. 17-21.

[8] However, it would be unreasonable to conclude from the plain language, as NNA does, that the Postal Service could file one day and implement the next. NNA Initial Brief, p. 17.

Commission may rely only on the record.[9] 5 U.S.C. section 556(d) and (e). These robust due process protections ensure that intervenors have broad latitude to gather necessary facts, to contest the testimony of the Postal Service witnesses, and to offer their own testimony as to how they view the proposal. It is generally unwise to limit artificially what filings can be made by parties or commenters,[10] as the submission is to an expert body which can separate wheat from chaff. The focus on the procedure for development of a factual record, and the exclusive reliance on that record, indicates that the Commission is to find facts, and apply the law to those facts, and render a thoughtful, written decision. This implies something other than an up or down decision.

Conformity to the Policies. The statutory interpretation of the PR (discussed in Section I.C., *supra*) is not persuasive. While the language may not be artful, it appears clear that requiring a certification from each Commissioner in the majority that "the **opinion conforms to the policies** established under this **title**" means that the analysis contained in the opinion faithfully applies the policies of the Title to the proposal. Triggering the policies of the Title imposes a responsibility on the Commission to evaluate many of the intervenors' proposals that the Postal Service believes irrelevant to the Commission.

The Postal Service's proposal identified several provisions of law that can be considered some of the policies of Title 39 applicable to the Commission's Advisory Opinion

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[9] Even the Postal Service believes that the Commission must issue factual findings, based on the record. Docket No. N2010-1 (Five-Day), Postal Service Initial Brief (Oct. 15, 2010), pp. 6, *et seq*.

[10] *See* Docket No. RM2012-4, Valpak Comments, pp. 11-12.

in this docket. *See also* Valpak Initial Brief, pp. 3-4. 39 U.S.C. section 3691 specifies objectives and factors to be considered by the Postal Service when revising service standards, including:

- preserv[ing] regular and effective access to postal services in all communities, including those in rural areas or where post offices are not self-sustaining (§ 3691(b)(1)(B));
- reasonably assur[ing] Postal Service customers delivery reliability, speed and frequency consistent with reasonable rates and best business practices (§ 3691(b)(1)(C));
- the needs of Postal Service customers (§ 3691(c)(3));
- mail volume and revenues projected for future years (§ 3691(c)(4));
- the projected growth in the number of addresses the Postal Service will be required to serve in future years (§ 3691(c)(5));
- the current and projected future cost of serving Postal Service customers (§ 3691(c)(6));
- the effect of changes in technology, demographics, and population distribution on the efficient and reliable operation of the postal delivery system (§ 3691(c)(7)).

Other provisions direct the Postal Service "to maintain an efficient system of collecting, sorting, and delivery of the mail nation-wide" (§ 403(b)(1)), "to establish and maintain postal facilities … consistent with reasonable economies of postal operations" (§ 403(b)(3)), and "to determine the need for post offices, postal and training facilities and equipment, and to provide such offices, facilities, and equipment as it determines are needed" (§ 404(a)(3)).

Briefing. Under 5 U.S.C. section 557, the Commission must offer parties an opportunity to submit briefing on fact, law, and the application of law to facts.

Substantial Evidence. Since any Commission "final order or decision" can be challenged in court under 39 U.S.C. section 3663, in accordance with 5 U.S.C. section 706, the burden is on the Commission to ensure that its Advisory Opinion is founded on substantial

evidence. 5 U.S.C. § 706(1)(E). The Postal Service expressed its general agreement with this proposition. *See* Docket No. RM2012-4, Postal Service Reply Comments, p. 6.

Formality of Proceedings. According to 5 U.S.C. section 556, the Commission must conduct formal proceedings. By virtue of 5 U.S.C. section 557(d), *ex parte* rules are imposed on the Commission.

Advisory Opinion. The Commission's workproduct is termed an "Advisory Opinion" from which one could deduce that the Commission's workproduct is not binding on the Postal Service, and its only force is that of reason and logic in the quality of the advice offered, not compulsion. This reinforces the responsibility of the Board of Governors to manage the Postal Service. However, the Advisory Opinion is based on an application of the law (the policies of Title 39) to the facts (after a hearing on the record). This language anticipates that the Postal Service was not fully trusted to make changes in the nature of service without having the benefit of independent advice from the Commission. For example, although the Postal Service may feel compelled to do anything to save money, the Commission can independently consider arguments concerning how the proposal conforms with Title 39.

Commissioner Certification. At the conclusion of the proceeding, each Commissioner who supports the Advisory Opinion that is issued has a duty to attest to his personal support of the opinion.

Postal Service Consideration of AO. At the end of the process, the Postal Service has an obligation to consider seriously the Commission's views and to the extent that the Commission's expertise and the record developed result in advice which is persuasive, the Postal Service has an obligation to give the record its respect and consideration.

Conclusion. Although other lessons can be drawn from the statute about the Advisory Opinion process, it is clear that the Commission has a statutory duty to allow parties to participate, and to consider their views. These statutory due process rights must not be jeopardized by Commission rules designed to placate the Postal Service and individuals in Congress. As long as PAEA is the law, it must be adhered to.

Lastly, it has been interesting to see how the instant Advisory Opinion docket has had some interplay with the Commission's consideration of Docket No. RM2012-4 (Modern Rules of Procedure for the Issuance of Advisory Opinions in Nature of Service Proceedings) commenced by the Commission on April 10, 2012 (Order No. 1309[11]). The Postal Service filed comments in that docket, which again minimize the contribution that could be made by intervenors before the Commission.[12] On the other hand, the American Postal Workers Union,[13] the Public Representative,[14] and Valpak[15] viewed the roles of intervenors and the Commission as being more significant.

E. The Postal Service's Main Source of Input on Changes in the Nature of Service Should Be the Commission's Advisory Opinion.

The Postal Service appears to believe that its primary source of helpful input came from its own solicitation from mailers during its rulemaking process. The Postal Service discusses

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[11] http://www.prc.gov/Docs/81/81905/Order1309.pdf.

[12] United States Postal Service Initial Comments (June 18, 2012).

[13] Docket No. RM2012-4, APWU Initial Response (June 19, 2012).

[14] Docket No. RM2012-4, Comments of the Public Representative (June 18, 2012).

[15] Docket No. RM2012-4, Valpak Comments (June 18, 2012).

"reviewing over 4200 public comments" to its Advance Notice of Proposed Rulemaking proposals published in the *Federal Register* on September 21, 2011. And it notes that, "**[a]fter considering** the more than 100 public comments received during the rulemaking [relating to its May 25, 2012 publication of Final Rules], the Postal Service modified the proposed rules and **elected to** implement the service standard changes in two phases." *Id.*, p. 13 (emphasis added). By contrast, the Postal Service believes that "The Intervenor and Commission Testimony in the Docket **Deserve Little Weight**," giving none of the witnesses before the Commission credit for providing useful information leading to the issuance of the Postal Service's May 25, 2012 final rule, or any other purpose. *Id.*, pp. 93-101 (emphasis added).

Although mailers appreciate the Postal Service publication in the *Federal Register* of its proposals, particularly when it solicits input, it must be remembered that this is an extra-statutory process. Congress has exempted the Postal Service from notice and comment rulemaking including the requirement to publish in the *Federal Register* (39 U.S.C. section 410), a fact which the Postal Service often notes in its publications.[16] It is the Advisory Opinion process which is the only procedure for significant service changes established by Congress. The Postal Service might well prefer a process which is entirely within its own control — where the Commission is not involved, and no one is looking over its shoulder as to what the input provides or how to analyze it — but that is not the process established by Congress. The voluntary *Federal Register* notice process should be used to supplement, not supplant, the statutory role of the Commission.

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[16] *See, e.g.*, Postal Service Notice of Proposed Rulemaking, 77 *Fed. Reg.* 38759 (June 29, 2012).

F. APWU Invents New "Policies Established under" Title 39.

APWU's Initial Brief examines the Commission's statutory responsibility under 39 U.S.C. section 3661(c), setting forth various statutory provisions from Title 39 that purport to be policies relevant to consideration of the Postal Service's proposal. *See* APWU Initial Brief, pp. 5-8. *See also* Valpak Initial Brief, pp. 3-4. APWU concludes:

> These requirements also **suggest** that the Postal Service must make **significant attempts** to retain the level of service provided **before claiming that such changes are necessary**. [APWU Initial Brief, p. 8 (emphasis added).]

No such suggestion from the statute is apparent to Valpak. APWU has failed to associate its conclusion that the Postal Service must "make significant attempts to retain the level of service provided before claiming that such changes are necessary" with any of the various statutory responsibilities cited,[17] but there is no statutory basis for APWU's new test. Indeed, the Postal Service has been thwarted in its attempts to retain the current level of service through its other cost-cutting initiatives, which have been imposed by many intervenors in this docket. The Postal Service is not required to lay out the complete range of cost cuts and persuade the Commission that all other options have been attempted first and failed. To do so would be an almost impossible task. While Valpak agrees that degradations in service are high risk and

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[17] Although misstating the test, APWU focuses on issues properly before the Commission, asserting that "the cost savings estimates presented in this case to justify the elimination of overnight delivery for the majority of First Class mail are overstated…." Likewise, APWU questions "the Postal Service's estimated impact on revenue, volume and net contribution." APWU Initial Brief, pp. 9-10. The Commission should address these issues, for they go to the heart of the Postal Service's proposal.

believes that these should be among the last imposed on mailers (Valpak Initial Brief, pp. 9-10), there is no duty to make the type of showing APWU reads into the statutory scheme.

G. The PR's Helpful Analysis on Understanding the Statutory Scheme Undergirding Advisory Opinions Points in the Right Direction.

The PR's Initial Brief presents a thoughtful analysis of how the Postal Service's proposal must be examined "in light of the rate cap." PR Initial Brief, p. 8. The PR's main point relates to how service degradation is a method to achieve an "increase in real price" and "price cap regulation alone does not always provide the ideal incentives for service quality enhancement." PR Initial Brief, p. 11, 13. *See* discussion in Section II, *infra*. The PR is right to remind us of the rule that "one must construe each provision of a statute to give effect to all of the statute's provisions…." PR Initial Brief, p. 13.

Although many observations could be made about the statutory scheme, following are only two. The first is that the Postal Service is a statutory monopoly, with the same set of temptations possessed by all monopolies. The second is that the statute that so many wanted enacted, PAEA, is certainly not a panacea, and is probably better viewed as being deeply flawed in several respects.[18] However, PAEA left the Advisory Opinion process standing. Indeed, with Congress imposing new financial burdens on the Postal Service while impeding

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[18] The same mailers and others who supported PAEA now must live with it, as well as Congress' continued imposition of political limitations on the Postal Service. Despite the repeated criticisms of "cost of service" ratemaking under the Postal Reorganization Act of 1970 ("PRA"), the Postal Service was not in continuous financial crisis from 1971 through 2006. The Postal Service had no financial incentives to degrade service. Congress was less involved in micromanaging the Postal Service under PRA than under PAEA. The Postal Service was not allowed to knowingly lose enormous amounts of money on a handful of products.

its effort to cut costs in areas which would be better for the Postal Service and its customers, the temptation to increase real prices by degrading service, as the PR states, is with us. The Commission needs to be involved in evaluating such proposals so the Postal Service makes the most informed decision possible.

Nevertheless, at the end of the day, Valpak supports the Postal Service moving forward with its Mail Processing Network Rationalization, with the understanding that the Postal Service is proceeding in phases, and that service changes are subject to continuing re-evaluation by the Postal Service including the review suggested by Greeting Card Association ("GCA") (*see* Section II.G). This is one of only a few cost-saving measures legally available to the Postal Service and, as long as it is wisely pursued, should not be recommended against entirely.

II. The Postal Service Should Be Urged to Study Cost Savings from Consolidation without a Systematic Degradation in Service.

A. MMA and NPPC Suggest that Service Quality Erosion Be Offset by a Reduction in the Applicable Price Cap.

The joint Initial Brief of MMA and NPPC urge the Commission to link the effect of the Postal Service's proposed reduction in service standards to the price cap applicable to the classes of mail subject to the service reduction:

> As witness Neels, testifying for the Public Representative, explained, **a reduction in service standards equates to a relaxation of the price cap.** Minimum service standards exist under price cap regimes to protect ratepayers from erosion of service quality. The Postal Service here is proposing precisely such an erosion. **The Commission should consider whether the service quality erosion should be offset by a corresponding**

> **reduction in the applicable rate cap.** [*Id.*, pp. 6-7, emphasis added.]

From an economic perspective, this argument has validity.[19] However, quite obviously, if such a link were made, the Postal Service's lost revenue from a reduced cap would diminish savings from the service standard changes, undermining the reason for the change. This Catch-22 reveals some of the further problems under PAEA's price-cap regime. The Initial Brief of MMA and NPPC does not propose how service erosion and the price cap could or should be linked.

B. The PR also Suggests that Proposed Reductions in Service Standards Be Linked to Price Adjustment Authority.

The PR points out that, although each market dominant class of mail is constrained by the price cap, the Postal Service fails to discuss the relationship between the quality of service for a class of mail and the price being paid for that service. According to the PR:

> the relaxation of service standards on two classes of mail are equivalent to the relaxation of the price cap as it applies to those two classes of mail. … the Postal Service and Commission should not ignore the economic reality that decreasing service for two classes of mail is a *de facto* rate increase for those two classes of mail.
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> The Public Representative respectfully requests that the Postal Service, in consultation with the Commission, **consider implementing service standards with a quantitative link to rate adjustment authority**…. [PR Initial Brief, p. 8 (emphasis added).]

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[19] The *raison d'etre* of the service performance measurement system now being implemented by the Postal Service is to help the Commission ensure that the price cap is not evaded by reductions in service. However, it makes little sense to expend great effort to fine tune the service performance measurement system while service standards against which performance is measured are being degraded on a nationwide basis.

This analysis should apply differently to First-Class Mail and Periodicals. If the Commission were to develop a quantitative link between degradation in the service standard and the Postal Service's price adjustment authority for each class of mail, it should only limit any applicable adjustment in price authority to products whose coverage exceeds a certain threshold, *e.g.*, the ratio of revenues to attributable costs for market dominant products, currently around 160 percent. It would make no sense to reduce the price adjustment authority applicable to underwater products, because the cumulative losses incurred on those products are an important contributing factor in forcing the Postal Service to propose reductions in the quality of service in this docket.[20]

The PR likewise fails to discuss any specifics concerning how degradation of service standards might be linked quantitatively to the Postal Service's price adjustment authority.

C. GCA Argues that Cost Savings Comparable to that Sought by the Postal Service Can be Achieved without Service Degradation.

GCA's Initial Brief argues that service degradation is simply not necessary in order to achieve the Postal Service's cost reduction targets:

> In evaluating the service reduction, the question, GCA suggests, should be … whether **other network rationalization plans** producing substantially similar degrees of streamlining and cost reduction **could be executed without degrading service.** The

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[20] Many years ago, when the Periodicals class was above water financially, profits on First-Class Mail were an important factor allowing the Periodicals class to make virtually no contribution to overhead costs. Since the Periodicals class went underwater, about 15 years ago, profits on First-Class Mail have been a major contributor to the continuing subsidy to Periodicals. Although the Periodicals class long has succeeded in pushing off the financial burden of overhead costs onto the Postal Service's profitable products, in this docket Periodicals cannot retain overnight service while pushing off the reduction in service quality to First-Class Mail alone.

> record made in this case demonstrates that **such plans are indeed possible.** It would be **irrational** for the Commission to recommend favorably a degradation of service entailed (or claimed to be entailed) by a particular plan if **other plans,** not so disadvantaged, offered closely comparable financial benefits. [GCA Initial Brief, p. 2 (emphasis added).]

Of course, the Postal Service proposal includes both consolidations that need not impact the overnight service standard, as well as others which clearly would.[21] Yet the Postal Service made no effort to estimate how much could be saved without eliminating overnight delivery for local First-Class Mail. *See* Valpak's Initial Brief, pp. 14-23. Being able to separate out these two categories of costs savings would seem to be critical to an informed analysis for two reasons.

First, should GCA's claim prove true, that virtually all of the Postal Service's targeted savings can be achieved without reducing the overnight delivery standard, GCA likewise would be correct that there would be no reason for the Postal Service to move forward with the proposed reduction in service standards.

Second, within the context of the proposals to link cost savings to a reduction in the Postal Service's price adjustment authority, cost savings that can be achieved from consolidation without eliminating overnight delivery should never be linked to the price cap.[22] It is only those additional savings attributable to reduction in service quality that could be

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[21] For example, the Postal Service has announced plans to close 48 facilities during the summer of 2012 without eliminating overnight delivery for local mail.

[22] In its Initial Brief, Valpak noted that "the Postal Service has successfully used it AMP process to consolidate some relatively nearby facilities with **no reduction in service standards.**" P. 14 (emphasis added).

appropriately linked to the price cap.[23] Although the Postal Service did not provide this information, an analysis of this type is more than simply an exercise of ascertaining whether a particular proposal complies with the provisions of Title 39. It would appear well within the Commission's authority to review this alternative, and to recommend that before degrading service the Postal Service first separate out its cost estimates, as discussed.

D. The PR Confuses Changes in Service Standards with Inadequate Service Performance.

The PR's Initial Brief states:

> The Public Representative recommends that the Commission consider advising that the Postal Service implement specific service standards coupled with **rate adjustment authority penalties** for **failing to meet** those standards…. The link could be a combination of a reward system for **exceeding standards** and a penalty for **failing to meet** standards. [*Id.*, p. 14 (emphasis added).]

The issue of whether the Postal Service is exceeding or failing to meet service standards can be addressed only by the performance measurement system. That is a separate issue from the proposed change in standards proposed in this docket, and it is a complex issue. Postal Service witness Elmore-Yalch (USPS-SRT-4) has testified that Postal Service customers consider **reliability of service** more important than **speed of service.**[24] Establishing a link between the

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[23] The smaller the estimate of these additional savings: (i) the smaller would be any reduction in the price cap; and (ii) the less would be the justification for adopting the new service standards. Economic linkage along these lines would reduce any incentive that the Postal Service might have to overestimate potential savings obtainable from a change in service standards.

[24] "[An] early report, titled *Tracking Customer Satisfaction in a Competitive Environment,* and a history of research since, suggest that **predictability and consistency are more important** for Postal Service FCM customers **than speed** *per se* can ever be, given that

price cap and a "permanent" reduction in service standards is a different matter than establishing a link to poor service performance measured during any particular period.

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and Valpak Dealers' Association, Inc.

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other market alternatives long ago positioned themselves as the high-speed, more expensive alternatives to the Postal Service. That is, the segment of customers for whom speed is a critical concern has long since relied on shipping and communication methods other than First-Class Mail." USPS-SRT-4, p. 7. Taking this testimony at face value, linkage of service performance with the price cap should focus attention (and any rewards and penalties) on reliability of service — *i.e.*, the variance reports — which happens to be a somewhat underdeveloped part of the service performance measurement system.

APPENDIX
Applicable Provisions of Administrative Procedure Act
(emphasis added)

5 U.S.C. section 556

(a) This section applies, according to the provisions thereof, to hearings required by section 553 or 554 of this title to be conducted in accordance with this section.

(b) There shall preside at the **taking of evidence**—
(1) the agency;
(2) one or more members of the body which comprises the agency; or
(3) one or more administrative law judges appointed under section 3105 of this title.
This subchapter does not supersede the conduct of specified classes of proceedings, in whole or in part, by or before boards or other employees specially provided for by or designated under statute. The functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner. A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case.

(c) Subject to published rules of the agency and within its powers, employees presiding at hearings may—
(1) administer oaths and affirmations;
(2) issue **subpenas** authorized by law;
(3) rule on offers of **proof** and receive relevant **evidence**;
(4) take **depositions** or have **depositions** taken when the ends of justice would be served;
(5) regulate the course of the **hearing**;
(6) hold conferences for the settlement or simplification of the issues by consent of the parties or by the use of alternative means of dispute resolution as provided in subchapter IV of this chapter;
(7) inform the parties as to the availability of one or more alternative means of dispute resolution, and encourage use of such methods;
(8) **require the attendance** at any conference held pursuant to paragraph (6) of at least one representative of each party who has authority to negotiate concerning resolution of issues in controversy;
(9) dispose of procedural requests or similar matters;
(10) make or recommend decisions in accordance with section 557 of this title; and
(11) take other action authorized by agency rule consistent with this subchapter.

(d) Except as otherwise provided by statute, the proponent of a rule or order has the **burden of proof**. Any oral or documentary evidence may be received, but the agency as a matter of

policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. The agency may, to the extent consistent with the interests of justice and the policy of the underlying statutes administered by the agency, consider a violation of section 557 (d) of this title sufficient grounds for a decision adverse to a party who has knowingly committed such violation or knowingly caused such violation to occur. A party is entitled to present his case or defense **by oral or documentary evidence**, to **submit rebuttal evidence**, and to conduct such **cross-examination** as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(e) The **transcript of testimony and exhibits**, together with all papers and requests filed in the proceeding, constitutes **the exclusive record** for decision in accordance with section 557 of this title and, on payment of lawfully prescribed costs, shall be made available to the parties. When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.

5 U.S.C. section 557

(a) This section applies, according to the provisions thereof, when a **hearing** is required to be conducted in accordance with **section 556** of this title.

(b) When the agency did not preside at the reception of the evidence, the presiding employee or, in cases not subject to section 554 (d) of this title, an employee qualified to preside at hearings pursuant to section 556 of this title, shall initially decide the case unless the agency requires, either in specific cases or by general rule, the entire record to be certified to it for decision. When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule. On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule. When the agency makes the decision without having presided at the reception of the evidence, the presiding employee or an employee qualified to preside at hearings pursuant to section 556 of this title shall first recommend a decision, except that in rule making or determining applications for initial licenses—
(1) instead thereof the agency may issue a tentative decision or one of its responsible employees may recommend a decision; or
(2) this procedure may be omitted in a case in which the agency finds on the record that due and timely execution of its functions imperatively and unavoidably so requires.

(c) Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the **parties are entitled to a reasonable opportunity** to submit for the consideration of the employees participating in the decisions—
(1) proposed **findings and conclusions**; or
(2) exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and
(3) supporting **reasons** for the exceptions or proposed findings or conclusions.
The **record** shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—
(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and
(B) the appropriate rule, order, sanction, relief, or denial thereof.

(d)
(1) In any agency proceeding which is subject to subsection (a) of this section, except to the extent required for the disposition of **ex parte** matters as authorized by law—
(A) no interested person outside the agency shall make or knowingly cause to be made to any member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, an ex parte communication relevant to the merits of the proceeding;
(B) no member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, shall make or knowingly cause to be made to any interested person outside the agency an ex parte communication relevant to the merits of the proceeding;
(C) a member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of such proceeding who receives, or who makes or knowingly causes to be made, a communication prohibited by this subsection shall place on the public record of the proceeding:
(i) all such written communications;
(ii) memoranda stating the substance of all such oral communications; and
(iii) all written responses, and memoranda stating the substance of all oral responses, to the materials described in clauses (i) and (ii) of this subparagraph;
(D) upon receipt of a communication knowingly made or knowingly caused to be made by a party in violation of this subsection, the agency, administrative law judge, or other employee presiding at the hearing may, to the extent consistent with the interests of justice and the policy of the underlying statutes, require the party to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation; and
(E) the prohibitions of this subsection shall apply beginning at such time as the agency may designate, but in no case shall they begin to apply later than the time at which a proceeding is noticed for hearing unless the person responsible for the communication has knowledge that it

will be noticed, in which case the prohibitions shall apply beginning at the time of his acquisition of such knowledge.

(2) This subsection does not constitute authority to withhold information from Congress.